Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1496–08 OF 2016 AND W-02(C)(A)-1497–08 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
15 SEPTEMBER 2017

Building and Construction Law — Dispute resolution — Adjudication — Setting aside — Application to set aside decision of adjudicator — Claim for professional fees — Termination of contract — Whether adjudicator acted in excess of jurisdiction — Whether the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') had no application to claims in respect of architectural fees — Whether claim a progress claim or final claim — Whether the CIPAA only applied to interim payments and not final claims

The respondent ('ARMC') was a firm of architects engaged by the appellant ('Martego') as the project architect for a proposed development. Works had been performed by ARMC when a dispute arose as to the amount of fees which ARMC was entitled to. ARMC took refuge under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to recover its fees. The claim made before the adjudicator was in the sum of RM599,500 being the professional fees. The adjudicator awarded the sum of RM258,550 being the balance amount of the total entitlement of RM631,228 less the amount paid of RM372,678. Martego, unhappy with the decision of the adjudicator, applied to the High Court to set aside the same premised on s 15 of the CIPAA on the grounds, inter alia, that the adjudicator had acted in excess of jurisdiction in that the CIPAA had no application to claim in respect of the architectural fees. The High Court judge ('HCJ') however, dismissed Martego's application. ARMC on the other hand, armed with the adjudicator's decision applied to the High Court to enforce the same which was allowed by the HCJ. Hence, the present appeals, namely, Appeal 1496 which was sought by Martego to set aside the decision of the HCJ and Appeal 1497 also sought by Martego against the decision of the HCJ in allowing the enforcement of the adjudication decision. The submission of Martego, inter alia, were: (a) relying on the case of *Gantley Pty Ltd v Phoenix International Group* [2010] VSC 106, the claim by ARMC was neither a progress claim nor final claim as the invoice issued was after the termination of the contract, therefore, the CIPAA did not cater for such post-termination claim; (b) the CIPAA only applied to interim payments and not to 'final claims' premised on what was stated by this court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717 and the phrase 'right to progress payment' appearing in s 36 of the CIPAA; and (c) the phrase 'right to progress payment' inferred that the CIPAA covered only interim claims. In

A support of this contention, reliance was made on the manner how the Victorian Supreme Court in *Gantley* had approached their Old Victorian Act.

Held, dismissing appeals with costs:

B (1) **(per David Wong JCA, majority)** As long as the claims were within the definition of 'payment' set out in s 4 of the CIPAA, the CIPAA comes into play. There was no mention of 'interim' or 'final' in the s 4 definition. The crucial words are simply 'work done or services rendered under the express terms of a construction contract'. That being the case, it does not C matter whether the payment claims were interim or final or claims made after a unilateral or mutual termination. As long as they are payment claims relating to a construction contract as defined in s 4 of the CIPAA applied (see para 44).

D (2) **(per David Wong JCA, majority)** The reliance on the words 'right to progress payment' appearing in s 36 of the CIPAA, was misconceived. Section 36 is actually housed in Part VI of the Act which is titled 'General' inferring expressly that the provisions are of a general nature as opposed to a specific one. Further, s 36 is titled and relates to 'Default Provisions in the absence of Terms of Payment'. That section primarily E talks of what regime of payment mode is applicable when there are no provisions in the construction contract. Hence, it can be said that the appearance of the phrase 'right of progress payment' in s 36 is of no significance in determining what kind of payment claims the CIPAA applies to which are specifically provided for in the form of ss 2, 4 and 5. F To impute that the CIPAA applies only to interim payment would be breaking a golden rule of construction of statute in not looking at the specific provisions in the context of the whole Act and referring to other provisions contained therein (see para 45).

G (3) **(per David Wong JCA, majority)** The Old Victoria Act, relied on by Martego, as interpreted by the Victoria Supreme Court on the phrase 'rights to progress payments' in s 9 is housed in Part 2 — Rights to Progress Payments is of no significance as the context in which it was interpreted was totally different to the case at hand. In the CIPAA, there H are specific provisions which, if one approaches one's task of construing a statute by looking at the same in its totality, allow one to come a reasoned conclusion that the CIPAA applies to all payment claims made for works and services done under a construction contract. Hence, the case of *Gantley* could not be used to support the position of Martego (see I para 46).

(4) **(per Hamid Sultan JCA, dissenting)** It was not in dispute that the termination took place before the completion of the construction. If there had been no termination or unilateral termination, their claim would have been for interim payment and the matter could be referred

pursuant to the CIPAA. If the contract had been terminated and accepted as in this case, then the claim of the respondent would relate to final account or final payment and in consequence the CIPAA would not be applicable. Since the claim by the respondent was not related to the CIPAA, the adjudicator would not have the jurisdiction to hear the dispute. In consequence, the decision of the adjudicator must be set aside. Upon the decision of the adjudicator being set aside, it followed that the enforcement of the decision had to be set aside (see paras 76 & 81).

(5) **(per Hamid Sultan JCA, dissenting)** If the CIPAA is made applicable to final account or final payment in relation to construction disputes as opposed to construction contract for interim payment, it may lead to an abuse of process. It was wrong to construe the Act of Parliament to include claims for final payment when the mischief of the CIPAA was intended to cure the timely payment for work related to progress payments and not the final account. It was principally wrong to read into the Act the phrase 'final payment' when Parliament has not expressly stated so and the holistic reading of the Act would lean towards interim payments only (see para 78).

[Bahasa Malaysia summary

Responden ('ARMC') adalah firma arkitek yang dilantik oleh perayu ('Martego') sebagai arkitek projek untuk pembangunan yang dicadangkan. Kerja-kerja dilakukan oleh ARMC apabila satu pertikaian timbul mengenai jumlah bayaran yang ARMC berhak. ARMC berlindung di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') untuk mendapatkan bayaran. Tuntutan yang dibuat di hadapan adjudikator adalah sebanyak RM599,500 iaitu yuran profesional. Adjudikator mengawardkan jumlah wang sebanyak RM258,550 sebagai baki jumlah kelayakan sebanyak RM631,228 dan menolak jumlah yang dibayar iaitu RM372,678. Martego, yang tidak berpuas hati dengan keputusan adjudikator, memohon ke Mahkamah Tinggi untuk mengetepikan keputusan adjudikator dengan bergantung pada s 5 Akta dengan alasan, antara lain, bahawa adjudikator, telah bertindak melebihi bidang kuasa kerana Akta tidak boleh diguna pakai dalam tuntutan fi arkitek. Hakim Mahkamah Tinggi ('HMT') bagaimanapun menolak permohonan Martego. Manakala, ARMC, dengan keputusan adjudikator, telah memohon ke Mahkamah Tinggi untuk menguatkuasakan keputusan adjudikator dan dibenarkan oleh HMT. Oleh itu, rayuan-rayuan ini, iaitu, Rayuan 1496 yang dipohon oleh Martego untuk mengetepikan keputusan HMT dan Rayuan 1497 juga dipohon oleh Martego terhadap keputusan HMT dalam membenarkan penguatkuasaan keputusan adjudikasi tersebut. Hujahan Martego, antara lain, adalah: (a) bergantung pada kes *Gantley Pty Ltd v Phoenix International Group* [2010] VSC 106, tuntutan oleh ARMC bukan tuntutan progres atau tuntutan akhir kerana invois yang

A dikeluarkan adalah selepas penamatan kontrak, oleh itu, Akta tidak memperuntukkan tuntutan selepas penamatan tersebut; (b) Akta hanya boleh diguna pakai untuk pembayaran interim dan bukannya 'tuntutan akhir' berdasarkan apa yang dinyatakan oleh mahkamah ini dalam kes *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717 dan frasa 'hak untuk
B kemajuan pembayaran' yang terdapat di s 36 Akta; dan (c) frasa 'hak untuk bayaran progres' menyimpulkan bahawa Akta hanya meliputi tuntutan interim. Sebagai sokongan hujahan ini, pergantungan dibuat atas cara Mahkamah Agung Victoria di *Gantley* mentafsirkan Akta Victorian Lama
C mereka.

Diputuskan, menolak rayuan dengan kos:

(1) **(oleh David Wong HMR, majoriti)** Selagi tuntutan berada dalam takrif 'bayaran' yang dinyatakan dalam s 4 Akta, Akta akan terpakai. Tiada
D peruntukan 'interim' atau 'final' dalam definisi s 4. Kata-kata penting adalah hanya 'kerja yang dilakukan atau perkhidmatan yang diberikan di bawah syarat-syarat kontrak kontrak'. Oleh itu, tidak kira sama ada tuntutan pembayaran adalah interim atau akhir atau tuntutan yang dibuat selepas penamatan unilateral atau penamatan bersama. Selagi
E tuntutan pembayaran adalah berkaitan kontrak pembinaan seperti yang ditakrifkan dalam s 4 Akta adalah diguna pakai (lihat perenggan 44).

(2) **(oleh David Wong HMR, majoriti)** Kebergantungan pada perkataan 'hak untuk pembayaran progres' yang tertera dalam s 36 Akta, adalah
F disalah tafsir. Seksyen 36 sebenarnya ditempatkan di Bahagian VI Akta yang bertajuk 'General' dengan jelas menyatakan bahawa peruntukan bersifat umum berbanding dengan yang spesifik. Selanjutnya, s 36 bertajuk dan berkaitan dengan 'Default Provisions in the absence of Terms of Payment'. Seksyen tersebut terutamanya menyatakan tentang
G rejim mod pembayaran yang terpakai apabila tiada peruntukan dalam kontrak pembinaan. Oleh itu, dapat dikatakan bahawa penampilan ungkapan 'hak kemajuan' di s 36 adalah tidak penting dalam menentukan jenis pembayaran tuntutan yang dikenakan Akta yang secara khusus diperuntukkan dalam bentuk ss 2, 4 dan 5. Untuk
H menyatakan bahawa Akta terpakai hanya untuk pembayaran interim akan melanggar kaedah pentafsiran statut terpenting dalam tidak melihat peruntukan tertentu dalam konteks keseluruhan Akta dan merujuk kepada peruntukan lain yang terkandung di dalamnya (lihat perenggan 45).

I (3) **(oleh David Wong HMR, majoriti)** Akta Victorian Lama, yang disandarkan oleh Martego, sebagaimana yang ditafsirkan oleh Mahkamah Agung Victoria mengenai frasa 'hak untuk pembayaran progres' dalam s 9 ditempatkan di Bahagian 2 — Hak untuk Bayaran Kemajuan adalah tidak penting kerana konteks di mana ia ditafsirkan

adalah berbeza sama sekali dengan kes semasa. Dalam Akta, terdapat peruntukan khusus iaitu, jika seseorang mentafsirkan statut secara keseluruhan, seseorang akan membuat kesimpulan bahawa Akta hanya terpakai untuk semua tuntutan pembayaran yang dibuat untuk kerja-kerja dan perkhidmatan yang dilakukan di bawah kontrak pembinaan. Oleh itu, kes *Gantley* tidak boleh digunakan untuk menyokong kedudukan Martego (lihat perenggan 46).

(4) **(oleh Hamid Sultan HMR, menentang)** Bahawa penamatan berlaku sebelum selesai kerja-kerja pembinaan tidak dipertikaikan. Jika tidak ada penamatan atau penamatan unilateral, tuntutan mereka adalah untuk pembayaran interim dan perkara itu boleh dirujuk menurut Akta. Sekiranya kontrak telah ditamatkan dan diterima seperti dalam kes ini, maka tuntutan responden akan dikaitkan dengan akaun akhir atau bayaran akhir dan akibatnya Akta tidak akan terpakai. Oleh kerana tuntutan oleh responden tidak berkaitan dengan Akta, adjudikator tidak akan mempunyai bidang kuasa untuk mendengar pertikaian tersebut. Akibatnya, keputusan adjudikator harus diketepikan. Apabila keputusan adjudikator diketepikan, ia mengikuti bahawa penguatkuasaan keputusan itu perlu diketepikan (lihat perenggan 76 & 81).

(5) **(oleh Hamid Sultan HMR, menentang)** Sekiranya Akta dibuat untuk akaun akhir atau pembayaran akhir berhubung dengan pertikaian pembinaan berbanding dengan kontrak pembinaan untuk pembayaran interim, ia boleh menyebabkan penyalahgunaan proses. Adalah salah untuk mentakrifkan Akta Parlimen untuk memasukkan tuntutan pembayaran akhir apabila tujuan Akta adalah untuk menggalakkan pembayaran tepat untuk kerja yang berkaitan dengan pembayaran progres dan bukan akaun akhir. Adalah salah untuk membaca ke dalam Akta frasa 'pembayaran muktamad' apabila Parlimen tidak menyatakan secara nyata dan bacaan holistik Akta tersebut akan bersandar pada pembayaran interim sahaja (lihat perenggan 78).]

Notes

For cases on adjudication, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4236–4239.

Cases referred to

Abidin Daver, The [1984] 1 All ER 470, HL (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
CIT v Hindustan Bulk Carriers (2003) 3 SCC 57, SC (refd)
China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1, CA (refd)
Citex (M) Sdn Bhd v Ingeback (M) Sdn Bhd [1995] MLJU 561; [1995] 1 LNS 52, HC (refd)

A *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96; [2000] 3 AMR 3475, HC (refd)
Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (distd)
Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ
B 732; [2016] 5 CLJ 882, HC (refd)
Gantley Pty Ltd v Phoenix International Group [2010] VSC 106, SC (refd)
Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd [2014] 5 MLJ 145; [2014] 7 CLJ 1, FC (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
C
Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd [1996] MLJU 359; [1997] 1 CLJ Supp 448, HC (refd)
Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal [2013] 1 SLR 401, CA (refd)
D
Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd [2016] 1 SLR 481, HC (refd)
Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd [2002] 2 MLJ 139, CA (refd)
E *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2016] MLJU 1051; [2017] 1 CLJ 101, HC (refd)
Meenakshi Naidoo v Subramaniya Sastri (1887) LR 14 IA 160, PC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
F *Ng Chee Yew Sdn Bhd & Ors v IJM Corp Bhd & Anor* [2011] 7 MLJ 122; [2009] 10 CLJ 378, HC (refd)
Pembenaan Leow Tuck Chui Sdn Bhd & Sons Sdn Bhd v Dr Leela' S Medical Centre Sdn Bhd [1995] 2 MLJ 57, SC (refd)
RHB Bank Bhd (substitution Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn
G *Bhd* [2010] 2 MLJ 188, FC (not folld)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anorther Case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Shahidan bin Shafie v Atlan Holdings Bhd & Anor [2013] 7 MLJ 215, HC (refd)
H *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364; [2007] SGHC 142, HC (refd)
Tommy Thomas v Peguam Negara Malaysia & other appeals [2001] MLJU 761; [2001] 3 CLJ 457, CA (refd)
UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case
I [2015] 11 MLJ 499; [2015] 5 CLJ 527, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2016] 6 MLJ 717; [2017] 1 CLJ 677, CA (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

Legislation referred to

Architects Act 1967 s 7A(1)(b)
Architects Rules 1996 Third Schedule, Part One, sub-para 23
Building and Construction Industry Security of Payment Act 2002 [AU] s 9, Part 2
Building and Construction Industry Security of Payments Act 2004 [SG] s 10
Construction Industry Payment and Adjudication Act 2012 ss 2, 3, 4, 5, 13, 15, 21, 23, 28, 29, 32, 36, 37, 40, Parts II, VI

M Nagarajah (Tanya Lopez and Corrinne Chin with him) (Shook Lin & Bok) for the appellant.
Sivabalan Sankaran (Tharmini Paramasivan with him) (Tan Swee Im, Siva & Partners) for the respondent.

David Wong JCA (delivering majority judgment of the court):

INTRODUCTION

[1] Before us are two appeals, namely, Appeal W-02(C)(A)-1496–08 of 2016 ('Appeal 1496') and W-02(C)(A)-1497–08 of 2016 ('Appeal 1497'). In Appeal 1496, the appellant sought to set aside an adjudication decision dated 14 April 2016 in the High Court but was rejected by the learned judge. In Appeal 1497, the appellant's appeal relates to the decision of the High Court allowing the enforcement of the aforesaid adjudication decision.

[2] We heard the appeals on 27 March 2017 and in view of a novel point raised, we saw fit to reserve our decision for deliberation.

[3] We have since read the draft grounds of our learned brother, Justice Hamid Sultan bin Abu Backer. However, with regret and respect, we are unable to concur with him on the outcome of this appeal. Hence the grounds herein are the views of myself and my sister Justice Umi Kalthum bt Abdul Majid and reasons as to what we think should be the outcome of this appeal.

[4] For easy reference, the appellant and respondent will be referred as Martego and ARMC.

BACKGROUND FACTS

[5] ARMC is a firm of architects and was engaged on 22 August 2014 by Martego as the project architect for the proposed development of four lots of land at Changkat Perak into four blocks of high rise of residential units cum recreation facilities.

[6] Works had been performed by ARMC and dispute arose as to the amount of fees which ARMC is entitled to. ARMC took refuge under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') to recover its fees. The claim made before the learned adjudicator was in the sum of RM599,500 being the professional fees. The learned adjudicator awarded the sum of RM258,550 being the balance amount of the total entitlement of RM631,228 less the amount paid of RM372,678.

[7] The termination of the ARMC's appointment as the architectural consultant occurred on 7 August 2015 and the same was accepted by ARMC on 10 August 2015.

[8] Martego being unhappy with the decision of the learned adjudicator dated 14 April 2016 applied to the High Court to set aside the same premised on s 15 of the CIPAA 2012. The learned judge dismissed Martego's application.

[9] ARMC armed with the adjudicator's decision applied to the High Court to enforce the same which was allowed by the learned judge.

HIGH COURT PROCEEDINGS

[10] Martego at the High Court premised its application on two grounds:

(a) the learned adjudicator had acted in excess of jurisdiction in that the CIPAA has no application to claim in respect of the architectural fees; and

(b) that there has been a breach of natural justice in the process of adjudication.

Excess of jurisdiction

Application of Architect Act 1967

[11] Martego's contention was simply this. ARMC is a firm of architects and as such it is bound by the Architects Act 1967 ('the AA') to recover its professional fees as there exists therein a procedural regime for recovery of professional fees. Learned counsel in supporting his contention relied on the following:

(a) s 7A(1)(b) of the AA, which essentially states that recovery of an architect's fee, charge, remuneration or other form of consideration for architectural consultancy services is to be done in any court, reads as follows:

> (1) An Architect shall not, unless registered as a sole proprietorship, a partnership or a body corporate and has been issued with a certificate of registration —
>
> ...
>
> (b) recover in any court any fee, charge, remuneration or other form of consideration for architectural consultancy services rendered as an architectural consultancy practice.

(b) sub-para 23, Third Schedule, Part One of the Architects Rules 1996 ('the Rules') : which gives the professional architect and his client the option of referring their dispute to mediation, although an initial reference to mediation is not a condition precedent for the parties to refer their dispute to arbitration in accordance with sub-para 24; and

(c) sub-para 24, Third Schedule, Part One of the Rules: which essentially states that disputes between a professional architect and his client which require settlement shall be by way of arbitration. Further, in the event the professional architect and his client are unable to appoint an arbitrator, either party may submit a written request to the President of the Board of Architects Malaysia ('BAM') to appoint a person to serve as an arbitrator.

[12] In view of the existence of a fee claim's regime in the AA, it was submitted in the High Court that the CIPAA 2012 regime is merely an act of general application to facilitate regular and timely payment and to provide a mechanism for the recovery of payment in the construction industry. And applying the principle of construction of *generalibus specialia non derogant*, it was submitted that the CIPAA has no application to the claim of professional architectural fees by the ARMC. The appropriate remedy of ARMC lies in arbitration as provided for in the AA.

[13] The learned judge rejected the contention in the following manner:

> [76] I agree that the dispute resolution mechanism under the CIPAA is by way of adjudication and the statutory requirement for dispute resolution under the Architects Act is by way of arbitration. I must also state that there is nothing strange in this difference as statutory adjudication came into being only with the coming into force of the CIPAA on 10 April 2014 and that there is no need to see adjudication and arbitration to be mutually exclusive of each other as adjudication would only yield a decision of temporary finality and it is only with arbitration or litigation that one gets a final and binding decision. The whole scheme of statutory adjudication was never intended to be set in opposition to arbitration or litigation. Adjudication operates independently on a separate track and indeed a fast track and it will not run into collision with arbitration or litigation simply because its track is different. before there was adjudication, there were already arbitration and litigation. After the introduction of adjudication, both arbitration and litigation will still continue except that now there is an additional dispute resolution

A mechanism of temporary finality that can be embarked upon before or concurrently with arbitration or litigation as the case may be. Thus one need not have to choose in an 'either or' approach between Adjudication and Arbitration but one can proceed in a 'both and' approach in resolving a dispute on an architect's claim against his client for his professional fees. Adjudication under the CIPAA was never
B designed to be in conflict with Arbitration and Litigation and so its process may be activated at any time where there is a valid payment claim under a construction contract. Premised on that proper perspective, the question of which would prevail over the other does not arise at all.

C Construction contract

[14] It was submitted by learned counsel for Martego that the contract between ARMC and Martego was not a construction contract as defined in the CIPAA 2012 and hence the learned adjudicator has no jurisdiction to entertain
D the claim made by ARMC.

[15] This submission relates to the interpretation of the definition of the phrase 'construction consultancy contract' as defined in the CIPAA 2012.

E

[16] The definition of 'construction consultancy contract' in s 4 of the CIPAA reads as follows:

> ... a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying,
F exterior and interior decoration, landscaping and project management services.

[17] It was the submission of Martego's learned counsel that the words 'architectural work' in the said definition cannot be read in isolation such that architectural work is meant as a definition of 'construction consultancy work'.
G Further it was also submitted that the phrase 'construction consultancy contract' must be construed conjunctively rather than disjunctively as the operative phrase used is '.and includes'. In short, the architectural work must be more than architectural work per se in the context of the CIPAA 2012. It must be, so to speak, part of the all-encompassing consultancy works which would
H include planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services within the dictates of the definition in s 4 of the CIPAA 2012.

I **[18]** The learned judge did not sustain the aforesaid submission and this was his reason:

> [23] With the greatest of respect, I find such an interpretation to be unduly straining the natural and ordinary meaning of the words used in the definition of 'construction consultancy contract'; skewing and slanting it to support one's stand

that it cannot be a construction consultancy contract that has only one single element of architectural work or even perhaps a bit of project management work since what has been contracted included contract administration. To me a 'construction consultancy contract' would cover and include a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services. If Parliament had wanted it to be confined to only a 'design and build contract' they could have said so in clear terms and the industry understands what a 'design and build contract' is.

[24]These various components after the word 'includes' can be present alone or in combination with the other services rendered such that the party engaged in such a contract may be providing just architectural works, just engineering services, just surveying services, just exterior and interior decoration services, just landscaping services or just project management services or a combination of these services.

Breach of natural justice

[19] The contention here was simply that the learned arbitrator had refused Martego's request to call oral evidence to resolve a dispute of fact relating to whether ARMC had prepared and submitted the relevant tender drawings for Tower 1. The learned adjudicator refused the request on the ground that this dispute can be resolved through the documents tendered before him.

[20] This contention was also rejected by the learned judge on the ground that the complaint by Martego was substantially a finding of facts rather than a breach of natural justice.

GROUNDS OF OUR DECISION

Should this court deliberate an issue not argued before the adjudicator or the High Court?

[21] At this juncture, we should state what had happened at the appeal hearing on 27 March 2017. After hearing a substantial part of the submission of the learned counsel for Martego, our learned brother, Justice Hamid Sultan bin Abu Backer posed to respective counsel the following question:

Whether the claim in question is for final account or for interim payment claim?

[22] In response to the posed question, learned counsel for ARMC informed the court that the agreement had been terminated and accepted by ARMC but as far as ARMC is concerned, the certificate in dispute is for an interim payment claim. We then adjourned the matter for a short break. Upon resumption, we informed respective counsel that no further oral submissions were necessary as we had the benefit of their written submissions on issues raised in the memorandum of appeal. However, we requested respective

counsel to make further submissions on the following issue:

> Whether CIPAA 2012 is applicable only for interim payment claim disputes or extends to final account claim disputes as well?

[23] Respective counsel had since then filed in further submissions on the aforesaid issue which of course had not been argued before the learned adjudicator and the learned judge.

[24] Before we discuss the issue, we wish to express our views on the grounds of appeal of Martego's complaints as per the memorandum of appeal which, to recapitulate, related to excess of jurisdiction and breach of natural justice. The contentions made by Martego before us are the same as those made in the High Court. In our view, the learned judge had correctly dealt with the contentions. As far as we are concerned, it is a matter of legal construction as to whether the AA should supersede the application of the CIPAA 2012 when there is a claim for professional architectural fees as in this case. It is also a matter of legal construction whether the contract between the respective parties is a construction contract as defined under the CIPAA 2012.

[25] The learned judge had applied the correct principles of construction of statute and had given a construction or interpretation consistent with the intention of Parliament. Hence, we find no error in the reasoning of the learned judge and had nothing further to add to what the learned judge had said.

[26] As for the complaint that there had been a breach of natural justice, we fully agree with the views of the learned judge for the simple reason that the CIPAA 2012 does not demand a certain method of process of adjudication. The main requirement is simply that both sides are accorded the opportunity to advance its case be it by way of written submissions or by hearing oral evidence. That is the choice for the adjudicator to make. In any event, having carefully examined the submission of learned counsel for Martego, the complaint in essence is one of finding of fact by the adjudicator as found by the learned judges, which the court is not allowed to examine into. With that we now turn our attention to the issue posed by the court.

Is it a jurisdiction issue?

[27] As explained earlier, this issue of applicability of the CIPAA 2012 to a final or interim claim is an issue raised by this court. Though we had posed this issue for consideration by respective counsel, we did not prohibit counsel for ARMC to submit on whether it is proper for us to pose and deliberate on the issue.

[28] Learned counsel for ARMC from the outset of his further submission urged this court not to consider this new issue premised substantially on what the Federal Court in the recent case of *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 had said on appellate jurisdiction on deciding on an issue that was not raised in the pleadings of the case. This was how the Federal Court put it:

> ... [14] While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the CJA and r 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of the court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court may allow a new point to be argued (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127; *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851; [1995] 1 CLJ 861). In so doing, it is however not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it is also trite that parties in litigation are bound by the four corners of their pleadings (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188).
>
> [15] What happened in the present case was that the Court of Appeal in the purported exercise of its discretion under s 69(4) of the CJA had substituted the defence of qualified privilege with that of absolute privilege, a defence which was never pleaded nor raised before the High Court. From the authorities set out earlier and the plain reading of s 69(4) of the CJA, the power of the Court of Appeal is only to draw inferences of facts and to make an order which ought to have been made by the High Court. The power is essentially limited to making of inferences of facts from the facts as found by the High Court ...

[29] In rebuttal, learned counsel for Martego submits that as a general rule, a new point cannot be raised but that rule is subject to two exceptions and they are that if it is a point of law relating to the jurisdiction of the tribunal and if it would result in a rectification of an erroneous order.

[30] In resolving the conflicting submissions of counsel, we must look at whether the jurisdiction relates to the adjudicator's initial jurisdiction. If we find that the CIPAA 2012 caters for interim claims only, then any adjudication on a final claim would be void ab initio as the adjudicator lacked jurisdiction ab initio. This sort of jurisdiction challenge in our view can be mounted before us even when it had not been challenged or when there was no reservation of right to challenge at the adjudication process.

[31] Other such challenges permitted under the CIPAA 2012 would include:

A (a) a dispute which does not relate to a 'construction contract' as defined in s 4 of the CIPAA 2012;

(b) a dispute which relates to a construction contract entered into by a natural person for work in respect of any building which is less than four storeys high and which is wholly intended for his occupation as provided for in s 3 of the CIPAA 2012;

(c) a dispute which relates to a construction contract not in writing as provided in s 2 of the CIPAA 2012; and

C (d) a dispute which relates to a construction contract which had been exempted by the Minister pursuant to s 40 of the CIPAA 2012.

[32] The common factor underlying the above occasions is simply that it concerns the original source of the jurisdiction of the adjudicator without D which the power and the authority to adjudicate and decide will not be bestowed on the adjudicator. The adjudicator's source of jurisdiction is by statute as opposed to common law based. To put it bluntly, the very existence of an adjudicator is premised on the CIPAA 2012 and his jurisdiction is circumscribed by that very statute. Put in another way, this sort of jurisdiction E cannot be conferred upon the adjudicator by consent or by waiver culminating from the conduct of parties for the simple reason that the adjudicator's source of power originates from one source only and that is the CIPAA 2012.

F **[33]** Hence, we say the case of *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* cited by learned counsel is, with respect, distinguishable to the case herein. In that case, it was a question whether parties are allowed to depart from their pleadings and courts are allowed to do so in only exceptional circumstances.

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[34] Jurisdiction challenge has always been allowed by the courts at any stage of proceeding. We can do no better than refer to the Privy Council case of *Meenakshi Naidoo v Subramaniya Sastri* (1887) LR 14 IA 160 which concerned the jurisdiction of the High Court at Madras where neither the H parties nor the High Court raised the question of jurisdiction to hear an appeal from the district court. The High Court then reversed the district judge. On appeal to the Privy Council it was held that consent or waiver could not cure the absence of jurisdiction. Sir Richard Baggallay, when delivering the advice of the board said (at p 166):

I

> It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to Their Lordships to be untenable. No

amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of Their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v Bull* LR 13 IA 144, as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a court incompetent to entertain it; and that the order of transference was also incompetently made. The district judge was perfectly competent to entertain and try the suit if it were competently brought; and Their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

[35] Premised on what we said above, we dismiss the objection of ARMC's counsel on our right to hear and deliberate on the issues posed by us.

Interim or final payment in the context of the CIPAA 2012

Martego's position

[36] The submission of learned counsel for Martego can be summarised as follows:

(a) the claim by ARMC is neither a progress claim nor final claim as the invoice issued was after the termination of the contract. That being the case, it is submitted that the CIPAA 2012 does not cater for such post-termination claim. The case of *Gantley Pty Ltd v Phoenix International Group* [2010] VSC 106 is relied on. That case is from the Supreme Court of State of Victoria, Australia which dealt with the Building and Construction Industry Security of Payment Act 2002 (Vic) (Old Victorian Act), an equivalent of the CIPAA 2012. The issue there was whether a claim for payment after termination is within the purview of the Old Victorian Act. The Supreme Court of Victoria held as follows:

> 144. It is well accepted that when a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights which have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary ...

A ...

146. On this analysis, the first question becomes: do the rights to make progress claims under each of the relevant contract up to the date of termination accrue such that they are not rights which are divested or discharged on termination but rather are rights which are 'unconditionally acquired' and thereby survive termination? If this is the case, the Act will apply. If not, it won't.

B

(b) the CIPAA 2012 only applies to interim payments and not to 'final claims' premised on what is stated by this court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717; [2017] 1 CLJ 677 and the phrase 'right to progress payment' appearing in s 36 of the CIPAA 2012;

C

(c) in *View Esteem*, learned counsel relies on the obiter remark of '... the CIPAA 2012 relates to interim payments and not the final accounts between the parties';

D

(d) the phrase 'right to progress payment' infers that the CIPAA 2012 covers only interim claims. In support for this contention, reliance by learned counsel is on the manner how the Victorian Supreme Court had approached to their Old Victorian Act which had provided as follows:

E

9 Rights to progress payments:

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

F

(b) who has undertaken to supply related goods and services under the contract, is entitled to a progress payment under this Act, calculated by reference to that date.

G

(e) the Supreme Court of Victoria in *Gantley* held as follows:

172 ... There being no definition provided by the Old Act (the Victorian Act) the construction of 'progress payment' in the first instance is to be derived from the ordinary and natural meaning of the words as used in the context of the text of the legislation. 'Progress payments' in a construction contract are payments made by providing installments of part of the agreed contract price sequentially and progressively over the life of a contract. As Finkelstein J said in *Protectavale*:

H

Progress payments are effectively payments by installments or periodic payments made over the life of the contract for construction work already completed.

I

In my opinion, it would be straining the language to suggest that a 'progress payment' can be made following either the completion of the contract or its termination.

[37] First, it is conceded by counsel for Martego and undisputed that the observations made in *View Esteem* were obiter in nature. It is thus not binding on us but we shall give it deference in our deliberations. A

[38] In answering the issue posed, the first stop for us must be the CIPAA 2012 itself and the words employed therein. Here of course there is no specific provision in the CIPAA 2012 which states that it only applies to 'interim payment claims' or that it applies to both 'interim and final claims'. In trying to answer the issue, we can only use the trite tools of interpretation of statutes which, in essence, is to give it a meaning which promotes the objectives of the statute. B C

[39] In the case of the CIPAA 2012, this is what was stated in the explanatory statement to the bill which was presented in Parliament:

> The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to facilitate regular and timely payment in respect of construction contracts and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to alleviate payment problems that presently prevail pervasively and which stifle cash flow in the construction industry. The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits to that effect and prohibits conditional payment terms that inhibit cash flow. The Act also seeks to provide remedies for the recovery of payment upon conclusion of adjudication. D E

[40] That statement is reflected in the Act itself which from the outset states that, in the long title: F

> An Act to facilitate regular and timely payment to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. G

[41] Nowhere in the Explanatory Statement does it state that the CIPAA 2012 applies only to interim payment claims. Its primary objective is succinctly clear and that is to provide an effective and economical mechanism to alleviate the cash flow issues prevailing in the construction industry. H

[42] To implement the aforesaid objective, the CIPAA 2012, pursuant to s 2, applies only to 'every construction contract made in writing relating to construction work carried wholly or partly within the territory of Malaysia including contract entered into by the Government'. I

[43] As to what kind of disputes to be adjudicated under the CIPAA 2012, this is provided for in Part II — Adjudication of Payment Disputes — where an unpaid party serve a 'payment claim' on a non-paying party to kick off the

process, so to speak. As to what 'kind of 'payment', this is defined in s 4 which states 'a payment for work done or services rendered under the express terms of a construction contract'.

[44] It is our considered view that as long as the claims are within the definition of 'payment' set out in s 4 of the CIPAA 2012 comes into play. Again, we see no mention of 'interim' or 'final' in the s 4 definition. The crucial words are simply 'work done or services rendered under the express terms of a construction contract'. That being the case, it does not matter whether the payment claims are interim or final or claims made after unilateral or mutual termination. As long as they are payment claims relating to a construction contract as defined in s 4 of the CIPAA 2012 applies.

[45] The reliance on the words 'right to progress payment' appearing in s 36 of the CIPAA 2012, with respect, is misconceived and our reasons were these. Section 36 is actually housed in Part VI of the Act which is titled 'General' inferring expressly that the provisions are of a general nature as opposed to a specific one. Further, s 36 is titled and relates to 'Default Provisions in the absence of Terms of Payment'. That section primarily talks of what regime of payment mode is applicable when there are no provisions in the construction contract. Hence, it can be said that the appearance of the phrase 'right of progress payment' in s 36 is of no significance in determining what kind of payment claims the CIPAA 2012 applies to which are specifically provided for in the form of ss 2, 4 and 5. To impute that the CIPAA 2012 applies only to interim payment would be breaking a golden rule of construction of statute in not looking at the specific provisions in the context of the whole Act and referring to other provisions contained therein.

[46] The Old Victoria Act, relied on by learned counsel for Martego, as interpreted by the Victoria Supreme Court on the phrase 'rights to progress payments' in s 9 is housed in Part 2 — Rights to Progress Payments is of no significance as the context in which it was interpreted is totally different to the case at hand. In the CIPAA 2012, there are specific provisions which, if one approaches one's task of construing a statute by looking at the same in its totality, allow us to come a reasoned conclusion that the CIPAA 2012 applies to all payment claims made for works and services done under a construction contract. Hence, we say that *Gantley* cannot be used to support the position of Martego.

[47] Further, in alleviating the cash flow problem of the construction industry one cannot look at it on the assumption that a contractor or subcontractor only has one contract of construction at only one point of time. It is not uncommon that they have several construction contracts simultaneously and they do rely on the due payment of their claims, be it

interim or final from one construction contract to finance another construction contract. Even if they have only one construction contract at one point in time, they also need the cash from their final claims to move on to another construction job.

[48] In any event, an adjudication award is only of a 'temporary finality' in nature against the main contractors and owners. The CIPAA 2012 allows parties to take their grievances to the High Court prior to the adjudication process, concurrent with the adjudication application and even after the adjudication process notwithstanding the adjudication decision to determine the very construction dispute before the adjudicator. Reference to an arbitration tribunal is also available to the parties and the factual findings of the adjudicator are not binding on either the High Court or the arbitration tribunal. This is specifically provided for in s 37 of the CIPAA 2012.

[49] Our views are reflective of the views held by the learned authors and practitioners in the CIPAA 2012 regime. In the book titled — *Adjudication of Construction Payment Disputes in Malaysia* — the learned authors (Chow Kok Fong, Lim Chong Fong (now a sitting judge of the High Court of Malaya) and Oon Chee Kheng) at p 45, states as follows:

> Although the Act is silent on this point, the wording of section 5(1) suggests that the term 'payment claim' does not only refer to progress payments but also extends to a claim for a one-off payment such as a final payment claim made on basis of the final accounts of a contract.

[50] Also in the book titled — *Construction Adjudication in Malaysia* — the learned authors (Lam Wai Loon and Ivan YF Loo) at p 64, states as follows:

> In this context, the 'payment' refers to a payment for work done or services rendered under the express terms of a construction contract. It does not cover payment for work to be rendered or services to be rendered under a construction contract. The payment claim may relate to either a progress claim or final claim for work done or services rendered under the express terms of construction contract. Depending on the terms of the particular construction contract, 'payment claim' in this context can include a claim for payment for preliminaries, payment due under a progress or final payment certificate, payment for or arising from varies works or changes instructed, payment for prime cost sums, costs adjustments, provisional sums, contingent sums and retention monies and payment for prolongation costs.

[51] We are also attracted by the manner in which the Singapore High Court approached it in their Building and Construction Industry Security of Payments Act 2004 ('the SOPA') which in our view bears semblance to our CIPAA 2012. In the case of *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364; [2007] SGHC 142 (see also *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR

481 and *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401) the issue of whether the phrase 'progress payments' covers final payment claims. In the SOPA, the progress payment is defined in s 10 and reads as follows:

> 'progress payment' means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —
>
> (a) a single or one-off payment; or
>
> (b) a payment that is based on an event or a date'

Justice Lai Siu Chiu dealt with it in the following manner:

> ... [24] Adopting a literal perspective, such an interpretation is justified by the unambiguous wording of the Act, which defines 'progress payments' as 'a payment to which a person is entitled for the carrying out of construction work or the supply of goods or services, under a contract' ('the main limb'). Such a definition expressly includes a 'single or one-off payment' or a payment 'based on an event or date' ('the supplementary limb').
>
> [25] The plaintiff had submitted that the Act does not cover final claims on the basis that they are not expressly provided for. I have several comments to make on this submission. First, the word 'includes' alludes to the non-exhaustive nature of the sub-provisions that follow. From this perspective, the operative definition of 'progress payment' should be centered on the main limb rather than the supplementary limb.
>
> [26] The plaintiff appeared to have adopted the tack that 'final payments' should not be included simply because they were not specifically identified in the supplementary limb as included within the main limb. This approach, with respect, neglects the structure of the provision, which unambiguously defines 'progress payments', at the outset, as payments to which a person is entitled for the carrying out of construction work under a contract.
>
> [27] Looking at the structure and wording of the provision, it appears that an exclusion of 'final payments' from the ambit of the Act can only be justified by express wording to that effect. It would not suffice to infer a legislative intention to exclude simply on the basis that 'final payments' were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. If the Legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad-ranging definition in the main limb must be determinative.
>
> [28] In addition, a plain reading of 'a payment that is based on an event or a date' or a 'single or one-off payment' clearly encompasses final payments. Such a conclusion is vindicated by the fact that the Act at no time makes any distinction between 'final claims' and 'non-final claims'. Implying such a distinction from the supplementary limb would severely impair the protection afforded by the Act, as it would create a

carte blanche for contractors to renege on the final stages of payment, which would have an equally deleterious effect on cash flow affecting other ongoing construction projects.

[52] In our own jurisdiction, we have from our own construction courts in Kuala Lumpur in two cases held that the CIPAA 2012 is not limited to interim claims only but also final account claims. The two cases are *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] 5 CLJ 527 and *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882. In *Uda*, Justice Mary Lim Thiam Suan (as she then was, now a judge of the Court of Appeal) correctly in our view said that the relevant point of reference in the CIPAA 2012 is the payment dispute in a construction contract and not the date of the payment dispute. That finding is wholly consistent to the manner in which we have earlier analysed the issue posed.

[53] In *Econpile*, Justice Lee Swee Sing correctly points out that there is a specific provision in the CIPAA 2012 stating what is not applicable in the CIPAA 2012 and that is s 3 — non-application which provides as follows:

> This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

And if Parliament had wanted to exclude final payment claims, that could have easily achieved by adding the appropriate wordings to s 2. The fact it was not done speaks for itself.

[54] Finally, we also take judicial notice that final claim payments had been lodged by an unpaid party and not objected to by a non-paying party and adjudicated by adjudicators without any fanfare since the advent of the CIPAA 2012. The court and legal practitioners must be careful in creating an issue when it is settled among the construction industry players that there is in fact no issue as to whether the CIPAA 2012 applies to final payment claims.

CONCLUSION

[55] The courts' power to set aside adjudicators' decision is circumscribed by statute in s 15 of the CIPAA 2012 and it is not a provision which allows the courts to sit in an appellate jurisdiction. The grounds which the courts can rely on to set aside the adjudicator's decision are limited such that the courts are not allowed to look into the merits of parties' case. The courts' prima facie duty must be to uphold the adjudicator's decision and not to look at it with a fine-tooth comb with the aim to find the faults in the adjudicator's decision. As long as the learned adjudicator had approached his task by adhering to the due process of his adjudication, the courts will not interfere. Only with this

A approach by the courts, will the aim of the CIPAA 2012 of providing a regime to alleviate the cash problem faced by contractors in the building industry be addressed and achieved.

B **[56]** In our findings on the issue posed, we had simply adopted a time-tested approach in discovering the intention of Parliament by looking at the relevant provisions and the words used therein in the context of the whole Act. Our interpretation is nothing but a reflection of the objectives as contained in the explanatory statement to the bill that was presented to Parliament.

C **[57]** Accordingly the appeals are dismissed with costs of RM25,000 subject to payment of allocatur fees. We also order that the deposit be refunded to the appellant.

D **Hamid Sultan JCA (delivering dissenting judgment of the court):**

[58] There are two appeals by Martego (respondent to adjudication decision) before us related to one adjudication decision under Appeal No W-02(C)(A)-1496–08 of 2016 ('the first appeal') and Appeal
E No W-02(C)(A)-1497–08 of 2016 ('the second appeal'), which came up for hearing on 27 March 2017. We reserved judgment and invited further submissions on two main issues which goes to the jurisdiction of the applicability of Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') itself. The questions posed by the court were as follows:

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(a) Whether the subject matter of the adjudication was based on interim payment claim or a final claim;

(b) Whether statutory adjudication in other jurisdictions makes a distinction between final bills and interim bills.

G **[59]** The first appeal is Martego's appeal to set aside the adjudication under s 15 of the CIPAA 2012. The second appeal is also Martego's appeal to set aside the enforcement order made by the learned High Court judge in respect of the adjudication decision pursuant to s 28 of the CIPAA 2012. If the first appeal is
H allowed, it will follow that the second appeal must be allowed and the enforcement order given under s 28 will have to be set aside.

[60] It was contended before us by the respondent to both appeals that it was wrong for this court to direct the parties to submit on the two issues related to
I jurisdiction, which was not raised and argued by the parties in the court below. And heavily relied on the Federal Court case of *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 and *RHB Bank Bhd (substitution Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188. I take the view that both cases are good law but there are a

number of exceptions. That is to say, the Federal Court in *Dato' Tan*'s case itself recognises the exceptions. His Lordship Arifin Zakaria CJ had this to say:

> While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the CJA and r 18(2) of the Rules of the Court of Appeal 1994 , this is subject to the overriding discretion of the court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court may allow a new point to be argued (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127; *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851; [1995] 1 CLJ 861). In so doing, it is however not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it is also trite that parties in litigation are bound by the four corners of their pleadings (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188).
>
> What happened in the present case was that the Court of Appeal in the purported exercise of its discretion under s 69(4) of the CJA had substituted the defence of qualified privilege with that of absolute privilege, a defence which was never pleaded nor raised before the High Court. From the authorities set out earlier and the plain reading of s 69(4) of the CJA, the power of the Court of Appeal is only to draw inferences of facts and to make an order which ought to have been made by the High Court. The power is essentially limited to making of inferences of facts from the facts as found by the High Court. ...

[61] The question posed by the court is related to jurisdiction and in consequence both the cases will not apply. Whilst it is trite that as a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below, this rule is subject to more than two exceptions. Some of them are as follows:

(a) first, a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction;

(b) secondly, the court of appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order;

(c) thirdly, if the decision of the court is a nullity based on the principles enunciated in the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393; and

(d) fourthly, when issues such as illegality or public policy are raised first time in the appeal provided there are sufficient materials in the appeal record to entertain the submission (see *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212

and *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1).

(See *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9; *Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd* [2002] 2 MLJ 139 and *Tommy Thomas v Peguam Negara Malaysia & other appeals* [2001] MLJU 761; [2001] 3 CLJ 457).

GENERAL JURISPRUDENCE RELATED TO CONSTRUCTION LAW

[62] The respondent's case is not just related to law of contract but relates to construction law which is seen as an evolutionary jurisprudence to the law of contract. It may relate to tort, commercial law, planning law, employment law, oil and gas law, etc. and covers a wide range of legal issues related to contract, bonds, guarantees, liens and other securities, tenders, consultancy contract, as well as many regulatory framework, etc. A construction dispute may not just involve the parties to the dispute but a range of persons and/or professionals whose evidence will be relevant and/or material to adjudicate upon a construction dispute. The conduct of parties during the progress of work as well as instruction by relevant parties may determine the outcome of the dispute, notwithstanding the contractual provision may not cover such instances or certification for work done has been denied, etc. Standard form contracts have been a norm and trade practices of the construction industry had carried much probative force in judicial decision making process as well as arbitration, adjudication, etc. In consequence, the jurisprudence relating to law of evidence and decisions related to breach of contract and breach of construction contract or construction dispute may not be necessarily the same. Relying on judicial precedents without making a distinction will tantamount to comparing an apple to an orange.

[63] It is important to note that the CIPAA 2012 deals with construction contract and periodical payment for work done. Primarily the relevant law will be law of contractual obligations. The CIPAA 2012 is not meant to cover construction disputes where the law applicable may be wider than law of contract. If this distinction is not appreciated in the right perspective, it will lead to convoluted jurisprudence. For example, interim payment will relate to contractual obligations and final payment may encompass more issues and law and the jurisprudence is not one and the same for both.

BRIEF FACTS

[64] The facts and law have been well articulated by the learned High Court judge in a 69 pages judgment (see *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2016] MLJU 1051; [2017] 1 CLJ 101). This judgment must be read

with the judgment of the learned judge to appreciate our reasoning in the proper perspective. The brief facts in my own words can be summarised as follows:

(a) Martego engaged the respondent who were architects as the project architect for the project;

(b) the clear provision of the Architect Act and/or Rules requires that a dispute as to fees of the architect must be referred to arbitration;

(c) Martego terminated the respondent before the completion of the contractual obligation of the respondent. The respondent accepted the termination and filed a claim under the CIPAA 2012 for professional fees and services rendered;

(d) the matter proceeded for adjudication under the CIPAA 2012. The adjudicator granted a sum of RM258,550 only with pre-award interest, post-award interest and costs of RM20,585 to the respondent; and

(e) to set aside the decision, Martego before the High Court had relied on two grounds, namely that: (a) the adjudicator had acted in excess of jurisdiction; and (b) there has been a breach of natural justice as the adjudicator failed to hold an oral hearing despite three separate requests from Martego.

[65] The memorandum of appeal in respect of the first appeal reads as follows:

1. The Learned Judge erred in law and in fact in dismissing the appellant's application in Kuala Lumpur High Court Originating Summons No: WA-24C-39-06/2016 to set aside the Adjudication Decision dated 14 April 2016 made by Ir. Lai Sze Ching ('Adjudication Decision').

Statutory Interpretation of CIPAA

2. The learned Judge erred in law and in fact in holding that the Construction Industry Payment and Adjudication Act 2012 (CIPAA) applies to all parties who provide construction consultancy services in relation to construction work when in fact the Preamble of CIPAA specifically sets out the objectives of CIPAA as being connected to or in relation to recovery of payment in the construction industry.

3. The learned Judge erred in law and in fact in holding that the definition of *'construction consultancy contract'* under Section 4 of CIPAA is inclusive such that the words appearing after *'include'* must mean either a single component of the services referred to, or a combination of all or a few of the services referred to when in feet, the said definition under Section 4 of CIPAA is exhaustive.

4. The learned Judge erred in law and in fact in holding that an expansive reading must be given to the definition section (under Section 4 of CIPAA) where as far as the purpose of the CIPAA is concerned the High Court in *Uda Holdings Bhd v Bisraya Construction Sdn Bhd* [2015] 5 CLJ 527 held that the definitions found in Section 4 of CIPAA are 'unusually definitive and exhaustive in their defines as

opposed to the practice of drafting general or non-exhaustive definitions'.

5. The learned Judge erred in law and in fact in holding that to require one to say that the definition of 'construction consultancy contract' under Section 4 of CIPAA has a reference only to 'Design and Build' contracts would be to put an undue strain to the definition of the term, when in fact, that reference was intended by Parliament.

6. The learned Judge erred in law and in fact in presuming the existence of a *casus omissus* in the interpretation of the definition of 'construction consultancy contract' under Section 4 of CIPAA which is contrary to all rules of construction when in fact, the definition under Section 4 is plain and unambiguous.

7. The learned Judge erred in law and in fact in construing the phrase *construction consultancy contract'* under Section 4 of CIPAA disjunctively rather than conjunctively despite the use of the operative phrase '... and includes ...' in the said provision.

8. The learned Judge erred in law and in fact in holding that the term 'architectural work' is to be read as a definition of 'construction consultancy contract' under Section 4 of CIPAA when it is in fact an extension of the phrase 'construction consultancy contract'.

9. The learned Judge erred in law and in fact in according a broad definition of *'construction consultancy contract'* pursuant to Section 4 of CIPAA to include the provision of architectural consultancy services when in fact the definitions in Section 4 have a particular and peculiar but limited meaning and understanding.

10. The learned Judge erred in law and in fact in holding that the Contract satisfies all the requirements of a 'construction consultancy contract' under Section 4 of CIPAA.

The Contract between the Appellant and Respondent

11. The learned Judge erred in law and in fact in holding that the Respondent was able to avail itself of the remedies under CIPAA when in fact the Letter of Appointment dated 22.8.2014 ('Contract') between the appellant and the Respondent is not a construction contract which triggers the application of CIPAA.

12. The learned Judge erred in law and in fact in failing to consider that the Respondent's scope of services under the Contract was for 'contract administration' pursuant to Section 3(b) of the Contract thereby rendering the Respondent a 'contract administrator' per the definition of Section 4 of CIPAA.

13. The learned Judge erred in law and in fact in failing to give the term 'contract administration' its plain meaning when the language in the Contract is unequivocal, unambiguous and needs no explanation.

The Architects Act 1967 (AA) and the Architects Rules 1966 (AR)

14. The learned Judge erred in law and in fact in failing to consider the mandatory dispute resolution mechanism under Sub-Rule 24, Third Schedule, Part One of AR which provides that disputes between a professional architect and his client which require settlement shall be by way of arbitration.

15. The learned Judge erred in law and in fact in applying the established rules of construction expressed by the latin maxim *generalibus specialia non derogant* which

provides that the specific legislation or the special provision in the specific legislation, namely the AR read together with AA, will exclude the operation of the general legislation, namely CIPAA.

16. The learned Judge erred in law and in fact in holding that the Respondent was entitled to avail itself to the adjudication process under CIPAA in contravention of the mandatory dispute resolution mechanism by arbitration provided under the AR.

17. The learned Judge erred in law and in fact in failing to give effect to the intentions of the Parliament by holding that merely because there is a procedure for an architect or his client to proceed with mediation and arbitration that by itself should not exclude them from the adjudication process under CIPAA.

18. The learned Judge erred in law and in fact in failing to consider that the Contract between the Respondent and Appellant is a contract between a professional architect and his client which falls under the purview of the AA read together with the AR.

19. The learned Judge erred in law and in fact in failing to consider that the appointment of an adjudicator under CIPAA falls within the jurisdiction of the KLRCA whereas the appointment of an arbitrator under the AA read together with the AR vests with the President of the Board of Architects Malaysia.

20. The learned Judge erred in law and in fact in holding that parties are at liberty to have the procedure under the AR running concurrently with adjudication when in fact, the use of the word *'shall'* in Sub-Rule 24(1) of the AR makes it unequivocal in its requirement that the parties refer their dispute to arbitration.

21. The learned Judge erred in law and in fact in holding that there is nothing to prevent the appellant from proceeding with arbitration under the AR even after the adjudication process is over as the language used in Sub-Rule 24(1) of the AR makes it mandatory, rather than directory, that arbitration must be used as the mode of dispute resolution.

22. The learned Judge erred in law and in fact in failing to consider and/or apply established principles of law that where a statute creates a right and, 'in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others.

Natural Justice

23. The learned Judge erred in law and in fact in finding that there was no breach of natural justice from the Adjudicator's failure to hold an oral hearing despite the appellant's 3 requests for an oral hearing to present its case and meet the case against it.

Appellate Interference

24. The learned Judge erred in law and in fact by making findings that a proper and thorough judicial appreciation of the factual matrix and the law would not have lent itself to, and fell into plain and obvious error, without a proper appraisal of the said factual matrix and submission of the law tendered, and consequently by erroneously dismissing the appellant's claim with costs.

[66] The memorandum of appeal for the second appeal reads as follows:

1. The Learned Judge erred in law and in fact in allowing the Respondent's application in Kuala Lumpur High Court Originating Summons No: WA-24C-47-06/2016 to enforce the Adjudication Decision dated 14 April 2016 made by Lai Sze Ching ('Adjudication Decision').

Statutory Interpretation of CIPAA

2. The learned Judge erred in law and in fact in holding that the Construction Industry Payment and Adjudication Act 2012 (CIPAA) applies to all parties who provide construction consultancy services in relation to construction work when in fact the Preamble of CIPAA specifically sets out the objectives of CIPAA as being connected to or in relation to recovery of payment in the construction industry.

3. The learned Judge erred in law and in fact in holding that the definition of 'construction consultancy contract' under Section 4 of CIPAA is inclusive such that the words appearing after 'include' must mean either a single component of the sentences referred to, or a combination of all or a few of the services referred to when in fact, the said definition under Section 4 of CIPAA is exhaustive.

4. The learned Judge erred in law and in fact in holding that an expansive reading must be given to the definition section (under Section 4 of CIPAA) where as far as the purpose of the CIPAA is concerned the High Court in *Uda Holdings Bhd v Bisraya Construction Sdn Bhd* [2015] 5 CLJ 527 held that the definitions found in Section 4 of CIPAA are 'unusually definitive and exhaustive in their defines as opposed to the practice of drafting general or non-exhaustive definitions'.

5. The learned Judge erred in law and in fact in holding that to require one to say that the definition of 'construction consultancy contract' under Section 4 of CIPAA has a reference only to 'Design and Build' contracts would be to put an undue strain to the definition of the term, when in fact, that reference was intended by Parliament.

6. The learned Judge erred in law and in fact in presuming the existence of a casus omissus in the interpretation of the definition of 'construction consultancy contract' under Section 4 of CIPAA which is contrary to all rules of construction when in fact, the definition under Section 4 is plain and unambiguous.

7. The learned Judge erred in law and in fact in construing the phrase 'construction consultancy contract' under Section 4 of CIPAA disjunctively rather than conjunctively despite the use of the operative phrase '... and includes ...' in the said provision.

8. The learned Judge erred in law and in fact in holding that the term 'architectural work' is to be read as a definition of 'construction consultancy contract' under Section 4 of CIPAA when it is in fact an extension of the phrase 'construction consultancy contract'.

9. The learned Judge erred in law and in fact in according a broad definition of 'construction consultancy contract' pursuant to Section 4 of CIPAA to include the provision of architectural consultancy services when in fact the definitions in Section 4 have a particular and peculiar but limited meaning and understanding.

10. The learned Judge erred in law and in fact in holding that the Contract satisfies all the requirements of a 'construction consultancy contract' under Section 4 of CIPAA.

The Contract between the appellant and Respondent

11. The learned Judge erred in law and in fact in holding that the Respondent was able to avail itself of the remedies under CIPAA when in fact the Letter of Appointment dated 22.8.2014 ('Contract') between the appellant and the Respondent is not a construction contract which triggers the application of CIPAA.

12. The learned Judge erred in law and in fact in failing to consider that the Respondent's scope of services under the Contract was for contract administration' pursuant to Section 3(b) of the Contract thereby rendering the Respondent a 'contract administrator' per the definition of Section 4 of CIPAA.

13. The learned Judge erred in law and in fact in failing to give the term *'contract administration'* its plain meaning when the language in the Contract is unequivocal, unambiguous and needs no explanation.

The Architects Act 1967 (AA) and the Architects Rules 1966 (AR)

14. The learned Judge erred in law and in fact in failing to consider the mandatory dispute resolution mechanism under Sub-Rule 24, Third Schedule, Part One of AR which provides that disputes between a professional architect and his client which require settlement shall be by way of arbitration.

15. The learned Judge erred in law and in fact in applying the established rules of construction expressed by the latin maxim *generalibus specialia non derogant* which provides that the specific legislation or the special provision in the specific legislation, namely the AR read together with AA, will exclude the operation of the general legislation, namely CIPAA.

16. The learned Judge erred in law and in fact in holding that the Respondent was entitled to avail itself to the adjudication process under CIPAA in contravention of the mandatory dispute resolution mechanism by arbitration provided under the AR.

17. The learned Judge erred in law and in fact in failing to give effect to the intentions of Parliament by holding that merely because there is a procedure for an architect or his client to proceed with mediation and arbitration, that by itself should not exclude them from the adjudication process under CIPAA.

18. The learned Judge erred in law and in fact in failing to consider that the Contract between the Respondent and Appellant is a contract between a professional architect and his client which falls under the purview of the AA read together with the AR.

19. The learned Judge erred in law and in fact in failing to consider that the appointment of an adjudicator under CIPAA falls within the jurisdiction of the KLRCA whereas the appointment of an arbitrator under the AA read together with the AR vests with the President of the Board of Architects Malaysia.

20. The learned Judge erred in law and in fact in holding that parties are at liberty to have the procedure under the AR running concurrently with adjudication when

in fact, the use of the word 'shall' in Sub-Rule 24(1) of the AR makes it unequivocal in its requirement that the parties refer their dispute to arbitration.

21. The learned Judge erred in law and in fact in holding that there is nothing to prevent the appellant from proceeding with arbitration under the AR even after the adjudication process is over as the language used in Sub-Rule 24(1) of the AR makes it mandatory, rather than directory, that arbitration must be used as the mode of dispute resolution.

22. The learned Judge erred in law and in fact in failing to consider and/or apply established principles of law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others.

Natural Justice

23. The learned Judge erred in law and in fact in finding that there was no breach of natural justice from the Adjudicator's failure to hold an oral hearing despite the appellant's 3 requests for an oral hearing to present its case and meet the case against it.

Appellate Interference

24. The learned Judge erred in law and in fact by making findings that a proper and thorough judicial appreciation of the factual matrix and the law would not have lent itself to, and fell into plain and obvious error, without a proper appraisal of the said factual matrix and submission of the law tendered, and consequently by erroneously allowing the Respondent's application with costs.

ORAL HEARING AND BREACH OF NATURAL JUSTICE

[67] On the issue of oral hearing and breach of natural justice, I wish to say that the adjudicator is a master of the proceeding and he has to exercise his discretion fairly and justly taking into consideration the CIPAA 2012 is meant to be quick and summary process. As it is a quick and summary process, Parliament in its wisdom has been careful to identify the qualified persons to hear dispute relating to the CIPAA 2012. One category of persons that the CIPAA 2012 directly and/or by legal construct recognises as competent and qualified to hear the CIPAA 2012 disputes are arbitrator and/or judges and will necessarily include arbitrators in KLRCA panel as well as ex-judges (see *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96; [2000] 3 AMR 3475 and *CIT v Hindustan Bulk Carriers* (2003) 3 SCC 57). This is set out in s 13 of the CIPAA 2012 itself. The other category of persons will relate to the appointment made by KLRCA pursuant to s 32 of the CIPAA 2012 and ordinarily will relate to professionals who need to be trained to appreciate legal niceties and ability to write adjudication decision. The law having provided for qualified persons to hear the CIPAA 2012, the decision of such persons on procedural matters will rarely be a subject matter of intervention of the court. Being a competent and qualified person to hear the

CIPAA 2012 dispute itself is not sufficient as the sole right to appoint a competent and qualified person to hear a CIPAA 2012 dispute relating to ad judication is vested solely with KLRCA (see s 23 of the CIPAA 2012. If there is constant justifiable complaint against an adjudicator for conduct or misconduct, it will be unlikely for the said adjudicator to obtain further assignment through KLRCA. In essence, the law provides proper check and balance for competency, qualification as well as appointment sufficient to say that the Director of KLRCA will only assign cases to appropriate persons taking into consideration the nature of dispute and the expertise required. In addition, parties themselves can appoint any person as an adjudicator of their own choice. That is to say, party autonomy in the appointment of adjudicator is well recognised in CIPAA 2012 (see s 21 of the CIPAA 2012). Having appointed the adjudicator at their own choice, the court will not ordinarily entertain the decision of the adjudicator on procedural matters (see *Ng Chee Yew Sdn Bhd & Ors v IJM Corp Bhd & Anor* [2011] 7 MLJ 122; [2009] 10 CLJ 378).

[68] If the Director of KLRCA compromises his discretion in appointing adjudicator, it will cause grave injustice to parties and there is little court can do to remedy any form of injustice arising from the appointment of adjudicators who are not proficient or who do not subscribe to impartiality principle as well as the concept related to natural justice itself. Such appointment will have damaging effect if the CIPAA 2012 is made applicable to final payment.

JURISDICTIONAL ISSUES

[69] If any party is dissatisfied with decision of the adjudicator they can re-agitate the issues by way of arbitration or litigation as the case may be. The issues related to jurisdiction will be the real issue which will determine this appeal and I will deal with it in details. The grounds taken by the appellant read as follows:

(a) the Adjudicator has no jurisdiction to adjudicate a dispute under CIPAA when the Architects Act 1967 ('AA') read together with the Architects Rules 1996 ('Rules') specifies a specific dispute resolution mechanism where the fees of an architect is in dispute; and

(b) the Contract is, in any event, not a 'construction contract' under CIPAA.

[70] On the first issue, the learned trial judge had spent substantial time in justifying that the CIPAA 2012 is applicable, notwithstanding the provision in the Architect Act read with the Rules, by statutory formula has to go for arbitration. What I wish to say here is the CIPAA 2012 is not against arbitration or litigation. It only gives a statutory formula for compulsory adjudication to be able to decide the issue summarily. If the Architect Act and Rules says it should be sent for arbitration does not necessarily mean that the

CIPAA 2012 is excluded when the CIPAA 2012 itself does not say so. I find merit in the reasoning and decision of the learned trial judge limited for the purpose of the instant case only and in consequence I will not labour on this issue further, as the CIPAA 2012 also gives the option for arbitration.

[71] On the second issue whether the CIPAA 2012 applies to 'construction contract', the learned trial judge had dealt with it extensively and held it applies. What I wish to say here is that the CIPAA 2012 defines construction contract very widely to encompass all and every work which has nexus to construction and will cover pre-construction work and also all form of consultancy work related to the proposed construction, provided it is in writing. The crucial element of the contract must be in relation to construction work. This is well articulated in s 2 of the CIPAA 2012 which reads as follows:

> 2. This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

[72] The interpretation section gives some clarity to what construction work will entail. The relevant part of the interpretation provision in s 4 does not appear to restrict the meaning of s 4. Section 4 defines construction consultancy contract, construction contract, construction work, construction work contract and contract administrator, in the widest form, as follows:

> 'construction consultancy contract' means a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services;
>
> 'construction contract' means a construction work contract or construction consultancy contract;
>
> 'construction work' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of —
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control work;
>
> (d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
>
> (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,
>
> and includes —

(A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

(B) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

'construction work contract' means a contract to carry out construction work;

'contract administrator' means an architect, engineer, superintending officer or other person howsoever designated who administers a construction contract.

[73] The learned trial judge's deliberation on the meaning of construction contract has merits and I take the view it subscribes to the wide definition endorsed in the CIPAA 2012. However, whether a construction contract in writing was in existence for the matter to be referred to adjudication is a jurisdictional issue. Further, whether the claim is related to interim payment or final account or final payment, will also be a jurisdictional issue. In this respect, final account or final payment or final certificate may not be one and the same. It may all depend on the facts and circumstances of the case. I will deliberate on the said issues further based on the non-controverted facts.

BRIEF FACTS AND LAW RELATED TO ARCHITECTURAL CONSULTANCY CONTRACT

[74] In this case, the architectural consultancy services contract was terminated and accepted by the respondent. That is to say, there is no dispute that it has been terminated. Once it is terminated, there will not be an existing contract for the matter to be referred to pursuant to the CIPAA 2012. However, if the termination is not accepted, then there is a dispute for the matter to be referred to adjudication. I find merit in the submission of the learned counsel limited for the purpose of this case only. To save courts time, I repeat the submission of the learned counsel for the appellant which read as follows:

B(ii) The obligations of the parties post-termination of the Contract

15. It is worth reiterating that the Respondent served the Invoice for payment on the appellant after the termination of the Contract was accepted by the Respondent and when the Contract no longer subsisted. What then became of the obligations of the parties under the Contract?

16. The answer, we submit, is found in Section 63 of the Contracts Act 1950 (see IA(P) 3-Tab 20). Once the parties agree to rescind the Contract, the Contract need not be performed (see also, *Ramli bin Shahdan v Motor Insurers' Bureau of West Malaysia* [2006] 2 MLJ 116 at pp 134–135, IA(P) 4-Tab 35).

17. Indeed, this was the intention of the parties going by the strict letter of the Contract itself where at Clause 6, the obligation of the appellant to make payment to the Respondent based on the schedule/mode of payment under the Contract was

A expressed as *UP to the point of termination* only. Beyond the termination of the Contract, the appellant is not obliged to make payment to the Respondent based on the schedule/mode of payment prescribed under the Contract.

18. A somewhat similar issue was ventilated before the High Court in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* [2017] 7 MLJ 732 at 752 (see IA(P) 3-Tab 25) B where Lee Swee Seng J took the view that 'just because there is no express provision in the CIPAA to say that it is applicable in cases where the construction contract has been terminated does not mean that the CIPAA is inapplicable when the contract has been terminated'.

19. In this regard, we respectfully submit that where there is no express provision in C CIPAA providing for the question of law and/or issue at hand, the Courts ought not go beyond their judicial role and interpret CIPAA at will. The interpretation of CIPAA ought to at all times reflect the intention of Parliament.

20. In *Duport Steels Ltd and others v Sirs and others* [1980] 1 All ER 529 at pp 541–542 (see (I(A)P 4-Tab 34) (as affirmed in the Federal Court in *R Rama* D *Chandran v the Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at pp 218–219, 1(A)P 3-Tab 24), Lord Diplock held that:

> ... *Parliament makes the laws, the judiciary interpret them ... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing* E *its intention what that intention was, and to giving effect to it*. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust ...
>
> F ... *it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts, and if so. what are the precise limits that ought to be imposed* ... It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred G amendments to statues which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest ... (Emphasis added.)

21. In applying the foregoing, we respectfully submit that the stand taken by Lee Swee Seng J in *Econpile* at p 752 (see IA(P) 3-Tab 25) is erroneous. By interpreting H CIPAA so as to effect a change in the law when there are no express wordings in the legislation to the same effect, His Lordship had effectively gone beyond his role as a Judge (which is to interpret a piece of legislation to mirror the intention of Parliament) and into the realm of law-making.

22. In any event, the facts of *Econpile* (see IA(P) 3-Tab 25) are distinguishable from I that of the present case. In the former case, there were two payment certificates, in the nature of progress claims issued, both dated 24 March 2015 and 31 March 2015 respectively ('outstanding invoices'). The contract between the parties was terminated on 17 April 2015. After the termination, the claimant served its payment claim for the outstanding invoices on 20.5.2015.

23. In short, the outstanding invoices were issued before the termination of the contract and accordingly, the High Court determined that the subsequent termination of the contract did not preclude the claimant from making a valid claim under CIPAA.

24. By contrast, however, the facts in the instant case are different. Here, the Respondent issued the Invoice dated 8.10.2015 for claims well after the termination of the Contract. The Invoice is not a progress payment as it was not made during the currency of the Contract. What then was the effect of the termination of the Contract on the Invoice?

25. In *Gantley Pty Ltd v Phoenix International Group* [2010] VSC 106 at 46 (see IA(P) 4-Tab 30), the Supreme Court of Victoria considered the effect of termination at common law and said that:-

> 144. It is well accepted that when a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights which have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary.

26. This does not mean that the 'wronged party' is left without a remedy. It merely means that the remedy available is no longer to be sought for under CIPAA. Instead, the remedy of contractual damages on the basis of a *quantum meruit* ought to be pursued by the 'wronged party' who has accepted the termination of a contract.

27. At paragraph 146 of *Gantley* (see IA(P) 4-Tab 30), the Supreme Court of Victoria aptly summarized the position thus:-

> 146. On this analysis, the first question becomes: do the rights to make progress claims under each of the relevant contract *up to the date of termination* accrue such that they are not rights which are divested or discharged on termination but rather are rights which are *'unconditionally acquired'* and thereby survive termination? *If this is the case, the Act will apply. If not, it won't.* (Emphasis added.)

28. In summary, the amount claimed by the Respondent under the Invoice was not a valid progress payment under the Contract. If it was, it would have been a cause of action which survived the termination of the Contract. However, since the Contract had already been terminated by the time the Invoice was issued, CIPAA will have no operation in relation to it.

BRIEF FACTS AND LAW IN RELATION TO INTERIM OR FINAL ACCOUNT OR FINAL PAYMENT

[75] The architectural consultancy services contract was related to four towers and three stages of work and each stage the respondent is entitled to a percentage of remuneration as follows:

Element	Scope of Work	Proposed fee based on progress of work
Podium car park structure	• To manage the construction from Ground floor up to 5th storey podium	Monthly progressive billing over 14 months
Tower 1	• A. Contract documentation – upon completion of tender drawing	35%
Tower 2	• A. Contract documentation – upon completion of tender drawing	35%
Tower 3	• A. Contract documentation – upon completion of tender drawing	35%
Tower 4	• A. Contract documentation – upon completion of tender drawing	35%

[76] It is not in dispute that the termination took place before the completion of the construction of the towers. If there has been no termination or unilateral termination, their claim would have been for interim payment and the matter can be referred pursuant to the CIPAA 2012. If the contract has been terminated and accepted as in this case, then the claim of the respondent will relate to final account or final payment and in consequence the CIPAA 2012 will not be applicable. My reasons are as follows:

(a) the CIPAA 2012 deals with construction contract and not the rights and liabilities of parties related to construction dispute and the law. The distinction here is not one of an apple and orange but it is one of a marble and pumpkin. The payment in the CIPAA 2012 relates to contractual claim and progress payment is based on contractual terms. However, when it comes to final account or final payment, the whole area of construction law and/or part may become applicable. For example, if the contractor is liable in negligence to adjoining owners and in consequence the employer becomes liable then the employer may have claims against the contractor;

(b) to appreciate the scope of the CIPAA 2012 and the construction contract, construction dispute and construction law, the phrases need to be explained:

(i) the CIPAA 2012 has everything to do with written construction contract. If there is a breach of the terms which resulted in non-payment, the law applicable to decide the issue to a large extent will be the law of contract;

(ii) construction contract as far as the CIPAA 2012 is concerned, it has been defined. The said definition may not be the same as defined in the dictionary or book writers. For example, learned author John Uff in his book titled *Construction Law* (9th Ed) makes the following observation at p 1:

> The term 'construction contract' now has a statutory definition covering most but not all types of construction work, and including both building and engineering work. Construction law, however, embraces all construction contracts, whether or not within the statute.

And also at the same page:

> The term 'construction law' is now universally understood to cover the whole field of law which directly affects the construction industry and the legal instruments through which it operates. But construction law extends well beyond the law as such.

(c) construction dispute excluding the CIPAA 2012 will naturally embrace many areas of law inclusive of civil, commercial as well as administrative law, etc the CIPAA 2012 is meant only to cover the contractual dispute and not construction dispute. When it comes to final account or final payment, the commercial reality is for the parties to settle the construction dispute as a whole, at least at the stage of final payment;

(d) construction contract itself may have defined what are the necessary considerations to be taken into account for final certificate or final account. Further, in some construction contracts, the meaning of final certificate or final account may have been contractually provided that does not necessarily mean the employer or employee is restrained from making claims which had nexus to the construction contract itself before the issue of final payment is settled. In in the case of *Pembenaan Leow Tuck Chui Sdn Bhd & Sons Sdn Bhd v Dr Leela' S Medical Centre Sdn Bhd* [1995] 2 MLJ 57, Edgar Joseph Jr observed:

> It is well known to lawyers engaged in the field of construction contract law that the question whether a building owner or main contractor is entitled to refuse to make payment of money to a contractor or contractor, as the case may be, allegedly due and payable under an interim certificate issued by an architect or engineer, pursuant provisions in a RIBA contract and other known forms of building contracts and sub contracts, on the ground that he has cross-claims alleging defective work or over-valuation or damages for delay, is a the question of ever-recurring importance, which inevitably throws open for discussion the actual terms of the particular contract or sub-contract in the case and the all too familiar trilogy of cases of *Dawnays Ltd v FG Minter Ltd & Anor* [1971] 2 All ER 1389; [1971] 1 WLR 1205, *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; [1973] 3 All ER 195; [1973] 3 to WLR 421, *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 and their progeny.

(e) the word final account is not mentioned in the Act. However, s 36 particularly provides a positive right to progress payment only. This will be consonant to the principle that the CIPAA 2012 is meant to be for summary determination where rule of law relating to trial or hearing procedure can be compromised and parties can resort to arbitration and/or litigation if they are not satisfied with the adjudicator's decision. The said s 36 reads as follows:

> 36(1) Unless otherwise agreed by the parties, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payment at a value calculated by reference to —
>
> (a) the contract price for the construction work or construction consultancy services;
>
> (b) any other rate specified in the construction contract;
>
> (c) any variation agreed to by the parties to the construction contract by which the contract price or any other rate specified in the construction contract is to be adjusted; and
>
> (d) the estimated reasonable cost of rectifying any defect or correcting any non-conformance or the diminution in the value of the construction work or construction consultancy services performed, whichever is more reasonable.
>
> (2) In the absence of any of the matters referred to in paragraphs (1)(a) to (d), reference shall be made to —
>
> (a) the fees prescribed by the relevant regulatory board under any written law; or
>
> (b) if there are no prescribed fees referred to in paragraph (a), the fair and reasonable prices or rates prevailing in the construction industry at the time of the carrying out of the construction work or the construction consultancy services.
>
> The frequency of progress payment is —
>
> (a) monthly, for construction work and construction consultancy services; and
>
> (b) upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract.
>
> The due date for payment under subsection (3) is thirty calendar days from the receipt of the invoice.

(f) it is trite that in litigation, dispute cannot be taken on instalment basis, though there may be exceptions (see *Henderson v Henderson* (1843) 3 Hare 100 and *Shahidan bin Shafie v Atlan Holdings Bhd & Anor* [2013] 7 MLJ 215). If Parliament in its wisdom had intended for the CIPAA

2012 to be applicable for final account or final payment, it would have clearly done so. It will not be the function of the court to add or minus what has been stated in the statute to broaden the scope of the CIPAA 2012 to include the final payment, save as to clarify the meaning attributable to the word or phrase based on the principles relating to 'Harmonious Construction of Statute'. Harmonious Construction of Statute may lead the court to recognise the implied or broad meaning of a word or phrase in a section, taking a holistic approach to other provisions of the Act as well as statutes (see *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96; [2000] 3 AMR 3475 and *CIT v Hindustan Bulk Carriers* (2003) 3 SCC 57). Without a proper trial or hearing in the form of arbitration or litigation and to allow a party to summarily execute a decision of the adjudicator may ultimately cause prejudice to the respondent to the award. This is so because the adjudicator's decision can, inter alia, be used to wind up the company against whom the decision has been made;

(g) in addition, s 29 of the CIPAA 2012 deals with suspension of work. At common law, it is trite that a contractor as a general rule will not be able to suspend work for non-payment though he may have a right to terminate the contract (see *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1996] MLJU 359; [1997] 1 CLJ Supp 448 and *Citex (M) Sdn Bhd v Ingeback (M) Sdn Bhd* [1995] MLJU 561; [1995] 1 LNS 52). Learned authors of Keatings on *Building Contract* (5th Ed), at p 157 observes:

> No general right to suspend work. Although particular contracts may give the contractor express rights if certificates are not paid, there is no general right to suspend work if payment is wrongly withheld. This is consistent with the principle that, except where there is a breach of condition or fundamental breach of contract, breach of contract by one party does not discharge the other party from performance of his unperformed obligations.

(h) s 29 displaces the common law rule and allows the contractor to suspend work and it relates to progress payment. Section 29 of the CIPAA 2012 read as follows:

> 29(1) A party may suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after receipt of the adjudicated decision under subsection 12(6).
>
> (2) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall give written notice of intention to suspend performance or reduce the rate of progress of performance to the other party if the adjudicated amount is not paid within fourteen calendar days from the date of receipt of the notice.

A (3) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall have the right to suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract upon the expiry of fourteen calendar days of the service of the notice
B given under subsection (2).

(4) The party who exercises his right under subsection (3) —

(a) is not in breach of contract;

(b) is entitled to a fair and reasonable extension of time to complete his
C obligations under the contract;

(c) is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party; and

D (d) shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court pursuant to
E subsection 37(1).

(i) final account or payment may include the exercise to open up, review and revise the certificate and/or certificate of extension, etc. To say the CIPAA 2012 includes the final claim is not strictly supported by the legislation. Reliance on the Singapore position or other jurisdictions
F where their statutes allow final account or payment to be dealt by summary process, will not subscribe to the rule of law related to statutes and our case laws. Further, their appeal and enforcement procedure as well as case laws related to adjudicator's decision may be different. A disputed adjudication decision made summarily as per the case laws in
G Malaysia will be fatal to the employer as well as the contractor as the decision can be used to wind up the company immediately as opposed to an arbitration award and/or judgment of the court. Pay first and dispute later principle may be a good option for progress payment but not for final account and/or final payment. Learned authors Chow Kok Fong,
H Lim Chong Fong and Oon Chee Kheng in their book titled *Adjudication of Construction Payment Disputes in Malaysia*, at pp 42–43 observes:

I [5.4] In each of these instances, the Contractor's entitlement to be paid relates relevantly to the amount certified on the interim certificate but this entitlement only accrues on the date when the Contractor should have received payment. There is authority in Malaysia for the proposition that a progress payment certificate which has been properly and duly issued enjoys temporary finality. It creates a debt due from the employer to the contractor which is capable of being enforced summarily.

and at pp 122–123 observes:

> [13.3] In this connection, a question which may arise is the extent to which the temporarily finality of an adjudication decision is comparable with the temporary finality which is ascribed by the authorities to a payment certificate issued as part of the certification process provided in a construction contract.
>
> [13.4] It is settled law in Malaysia that a progress payment certificate which has been properly and duly issued enjoys temporary finality. In *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* (2001), Jefferey Tan J (as he then was) held that the respondent in that case was indebted to the petitioner for the amounts certified in the relevant payment certificates and that since the respondent was unable to discharge this debt, the respondent company would be wound up. This decision was subsequently affirmed by the Court of Appeal in *Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd* (2008).
>
> [13.5] In contrast, the same could not be said of the amount awarded by an arbitrator. In *Malayan Flour Mill Bhd v Raja Lope & Tan Co* (2006), Ramly Ali JC (as he then was) held that an arbitrator's award, unlike an order or judgment of a court, does not immediately entitle a successful party to levy execution against the assets of the unsuccessful party. The successful party has to first 'convert the award into a judgment or order of the court' before he can proceed to levy execution. This decision was cited with approval by the Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* (2007). Gopal Sri Ram JCA (as he then was) in particular stated, 'I entirely agree' with the decision of Ramli Ali JC in *Malayan Flour Mill.* It is interesting to note that the learned judge also sat in the Court of Appeal in *Dataran Rentas* and in his judgment in the earlier case had stated that the unsatisfied payment certificates would entitle the petitioner to proceed with the winding up proceeding and all 'issues that go to challenge the debt may be dealt with at the hearing of the petition'. It would appear from these decisions that in the event of a winding up of the paying party, the unpaid party may have a better claim on the basis of the amount certified in a progress payment certificate than a sum awarded by an arbitrator.
>
> [13.6] In adjudication under the CIPAA, section 28 provides specifically for an adjudication to be enforced by an application to the High Court 'for an order to enforce the adjudication decision as if it is a judgment or order of the High Court'. The stipulation of this as a procedural step suggests that the status of an adjudication decision in the context of a winding up approaches that of an arbitration award the enforcement of which is provided under section 38(1) of the Arbitration Act 2005. As suggested by the decisions in *Malayan Flour Mill and Mobikom v Inmiss*, it follows that in the event of a winding up of the paying party, an unpaid party may have a better claim on the basis of the amount certified in a progress payment certificate than on a sum awarded under an adjudication decision.

(j) it is also interesting to note that the learned authors are careful to use the word progress payment several times in pages cited above to anchor the argument of material injustice which may arise if a construction of the

statute is given to include final account or final payment. Though the learned authors make a distinction between the adjudication decision and payment certificate, the principles for winding up is related 'debt due and owing' and it is not necessary for an award or judgment to be in existence;

(k) in addition, the preamble of CIPAA 2012 says regular and timely payment. Regular and timely payment will only be in issue if it is a contract which needs to be performed and not to an obligation which has been completed. The phrase 'regular and timely' is conjunctive and not disjunctive. The position arguably, may be different if it had been stated as 'Regular or timely payment'. The preamble relates to overcome cash flow problem relating to construction contracts and not construction dispute. The observation of the Federal Court relating to cash flow in the case of *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] 5 MLJ 145; [2014] 7 CLJ 1 is instructive. The court dealt with some of the cases in relation to construction contract, interim payment and cash flow or liquidity and stated on the facts, inter alia, as follows:

> [33] That liability was contingent was also impliedly refuted by cl 19 in the sub contract. It should not be lost that 'the purpose of an interim certificate is to provide by payments on account a cash-flow to enable the contractor to finance the work' *Crown House Engineering Ltd v Amec Projects Ltd* (1989) 6 Const LJ 141, per Slade LJ), to enable 'interim payments to be made to the contractor as the Works progress' (*Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd* (2001) 75 ConLR 112; [2001] EWCA Civ 1). 'The primary purpose of the interim certificates in this kind of contract is to ensure that the contractor will receive regular stage payments as his work progresses' (*London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 Con LR 99; see also *Rohcon Ltd v SIAC Architectural Ltd* [2003] IEHC 1133S 01) so 'that the sub-contractor can have the money in hand to get on with his work and the further work he has to do' (*Dawnays Ltd v FG Minter Ltd and another* [1971] 2 All ER 1389 per Lord Denning MR, which *dictum* was adopted by the Federal Court in *Bandar Raya Developments Bhd v Woon Hoe Kan & Sons Sdn Bhd* [1972] 1 MLJ 75; [1971] 1 LNS 11). '... The purpose of interim certificates is to see that the contractor is in sufficient funds to carry on the construction as it progresses' (*Unpaid Interim Payment Certificates by Vinayak Pradhan* [1997] 2 MLJ xv).

[77] In view of ss 29 and 36, any reasonable tribunal appraised with the facts and law relating to construction claim, construction contract, construction dispute and construction law will come to a conclusion that the CIPAA 2012 is limited to progress claim. On this issue, I find merit in the submission of the learned counsel for the appellant. To save judicial time, I repeat the submission verbatim and it reads as follows:

> C. Was the Invoice for a 'progress payment' or a 'final claim'?

29. It is worth reiterating that the term 'progress payment' under CIPAA is found in Section 36 (see IA(P) - Tab 1) which provides for a statutory right to progress payment where there is no specific mechanism for the calculation of the same in construction contracts. In the instant case, the value of the progress payment is calculated by reference to the rate specified in the Contract (per Section 36(1)(b) of CIPAA) (see IA(P)- Tab 1).

30. CIPAA does not define a 'progress payment' nor does the Act expressly mention whether its application would cover final payments.

31. The court in *Gantley* (see IA(P) 4 - Tab 30) drew a distinction between progress claims and final payment claims at paragraph 233 of the judgment and the distinguishing features may be summarized as follows:-

(a) once the final payment is made pursuant to a final payment claim, the rights and claims of the parties under the contract are settled through accord and satisfaction with the result that each party's obligations under the contract are discharged; and

(b) by contrast, a progress claim under the contract does not have this effect. Progress payment made pursuant to a progress claim which turns out to be wrong would not preclude a later adjustment to correct the error.

32. Further, at paragraph 239 of the judgment in *Gantley* (see IA(P) 4-Tab 30), the court held that *'the provision of a final balancing of account between the contracting parties is a hallmark of a final payment claim.'*

33. In the instant case, we would submit that that the Invoice is neither a progress payment nor a final claim under the Contract for the simple reason that the Invoice was issued after termination of the Contract. Further:

(a) the Invoice could not have been a 'progress payment' because the progress payment in respect of Towers 1, 2 and 3 only fell due upon completion of the Contract Documentation Phase. It is glaring from the Respondent's Payment Claim itself that the Invoice comprised work done for 'partial completion' of the Contract Documentation Phase in respect of Towers 2 and 3;

(b) nor could the Invoice have been a 'final claim' because the contractual process for the making of a final payment claim under the Contract was extinguished upon the early mutual termination of the Contract – i.e. The balance 10% under the Contract would have been due only upon the Respondent obtaining the Certificate of Completion and Compliance. This was not the case; and

(c) like in *Gantley* at p 72, para 238 (see IA(P) 4 - Tab 30), the Invoice was prepared and served well after the termination had occurred, following which no further work was carried out under the Contract.

34. As such, the distinction between a 'progress payment' and a 'final claim' is, we submit, not pertinent in deciding the instant case. Regardless of its form, the Invoice was in substance made post-termination of the Contract.

35. The jurisprudence in this area is divided - with the Court of Appeal in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717 at 744 (see IA(P) -

A Tab 15) suggesting in obiter on the one hand that the CIPAA's application is only in relation to interim payments:

> [32] ... the CIPAA 2012 relates to interim payments and not the final accounts between the parties.'

B while the High Court in *Econpile (supra)* (see IA(P) 3–Tab 25) on the other hand suggesting that from the rationale and purpose perspective of the Act, there was no good reason to exclude its application once the construction contract had been terminated.

C(ii). The meaning of 'right to progress payment' under Section 36 of the CIPAA *by*
C *reference to similar provisions in other jurisdictions*

(a) The Australian position - the Old Victorian Act and the Old NSW Act

36. As submitted earlier on, the Old Victorian Act bears resemblance to the CIPAA. Section 9 of the Old Victorian Act (see IA(P) 3 – Tab 19) provides for the *'rights to progress payments'* and subsection (1) reads:

D

> (1) *On and from each reference date under a construction contract, a person:*
>
> (a) *who has undertaken to carry out construction work under the contract, or*
>
> E (b) *who has undertaken to supply related goods and services under the contract, is entitled to a progress payment under this Act, calculated by reference to that date.'*

37. The corresponding provision in the CIPAA is found in Section 36(1) (see IA(P)-Tab 1) which although drafted differently, bears the same meaning in so far as
F it states:-

> (1) *Unless otherwise agreed by the parties, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payment at a value calculated by reference to —*
>
> G (a) *the contract price for the construction work or construction consultancy services;*
>
> (b) *any other rate specified in the construction contract;*
>
> (c) *any variation agreed to by the parties to the construction contract by*
> H *which the contract price or any other rate specified in the construction contract is to be adjusted; and*
>
> (d) *the estimated reasonable cost of rectifying any defect or correcting any non-conformance or the diminution in the value of the construction work or construction consultancy services performed, whichever is more*
> I *reasonable, (emphasis added).*

38. In interpreting the Old Victorian Act, the Supreme Court of Victoria had on at least 2 occasions determined that the Old Victorian Act's application is *exclusive to 'progress payments' only*, in line with the intent and purpose of the Old Victorian Act:-

(a) In *De Martin and Gasparini Pty Ltd v Energy Australia arid Another* (2002) 55 NSWLR 577 at 590–591 (see IA(P) 3-Tab 26) the Supreme Court of NSW acknowledged that while the term 'progress payments' is not fully articulated in the Old Victorian Act, the court referred to the decision in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42 (see IA(P) 4 - Tab 31) where the learned Judge in the latter case concluded that:

> if the Act *(the Old Victorian Act)* was intended to apply in the case of final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s 3(1) to refer to the entitlement to receive all payments due under the construction contract, rather than only 'specified progress payments'.

(b) In *Gantley* at pp 53–54 (see IA(P) 4 - Tab 30), the Supreme Court of Victoria once again delivered its views on the definition of 'progress payments' and took the position that it would be *'straining the language'* to suggest that a claim for 'progress payment' can be made upon, inter alia, termination of a contract:

> 172. ... There being no definition provided by the Old Act *(the Victorian Act)* the construction of 'progress payment' in the first instance is to be derived from the ordinary and natural meaning of the words as used in the context of the text of the legislation. 'Progress payments' in a construction contract are payments made by providing instalments of part of the agreed contract price sequentially and progressively over the life of a contract. As Finkelstein J said in *Protectavale:*
>
> *Progress payments are effectively payments by instalments or periodic payments made over the life of the contract for construction work a/ready completed.*
>
> *In my opinion, it would be straining the language to suggest that a 'progress payment' can be made following either the completion of the contract or its termination.* (Emphasis added.)

39. In fact, the Old NSW Act which was applied in *Jemzone Pty Ltd* (see IA(P) 4 - Tab 31) also provides for the 'right to progress payments' under Section 8. Section 8(1) and (2)(a) of the Old NSW Act (see IA(P) 3 - Tab 17) are almost identical to Section 9(1) and 2(a) of the Old Victorian Act (see IA(P) 3-Tab 19) with the only difference being the parentheses in Section 8(2)(a)(ii) of the Old NSW Act.

40. The court in *Gantley* at paragraph 245 (see IA(P) 4- Tab 30) also held that if indeed the claims made in that case were final payment claims, they were not permitted to be made under the Old Victorian Act. This, the court said, was in line with the core purpose of the Act:

> 249. *The core purpose of the Act is to provide a statutory right to payment of progress payments under a construction contract* and to provide a mechanism to enable the party so entitled to recover those payments. *The framework under the Old Act was confined to providing this facility in respect of 'progress payments'.*
>
> 251. Under this ground, I am satisfied that the payment claims were invalid. They failed to satisfy a basic and essential requirement of the legislation in a

substantial and material way, and further that the failures were manifest on the face of the documents. *There was therefore jurisdictional error.* (Emphasis added.)

41. If the rationale in *Gantley* (see IA(P) 4-Tab 30) was adopted, would this mean that the Respondent would be left without a remedy? Surely not — as the Respondent would still be able to seek remedies in litigation or arbitration as provided under the Contract. As explained by the court in paragraph 252 of the judgment:

> 252. If final payment claims are to be made in respect of construction contracts to which the Old Act applies, the contractual mechanism, if there be one, should be engaged. If there be a failure on the part of a respondent to such a claim to make payment, when pursuant to the contract it is required to do so, litigation and not the Act, is the last resort for enforcement. *Likewise, in cases such as the present, if the construction contract to which the Old Act applies has been terminated prior to the time when the contract permits a final payment claim to be made, and the contractual mechanism for the making of a final payment claim is not, or cannot be engaged,* in circumstances where a principal or head contractor refuses payment of what is due, *litigation and not the Act is again the last resort for enforcement of what may be due to a contractor.* (Emphasis added.)

(b) The Singaporean position

42. The High Court of Singapore adopted a broad interpretation of the Singaporean *Building and Construction Industry Security of Payment Act 2006 ('Singaporean Act')* (see IA(P) 3-Tab 16) in *Tionq Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 at 370 (see IA(P) 4-Tab 27) to include adjudication of final progress payments. At paragraph 27, the court held:

> 27. Looking at the structure and wording of the provision, it appears that an exclusion of 'final payments' from the ambit of the Act can only be justified by express wording to that effect. It would not suffice to infer a legislative intention to exclude simply on the basis that 'final payments' were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. *If the Legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad-ranging definition in the main limb must be determinative.* (Emphasis added.)

43. By contrast to the CIPAA and the Old Victorian Act, the Singaporean Act (see IA(P) 3- Tab 16) defines 'progress payment' as:

> *... a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —*
>
> (a) *a single* or *one-off payment,* or
>
> (b) *a payment that is based on an event or a date;*

44. Notably absent from the Singaporean Act is the 'right to progress payment' which features in the Old Victorian Act, Old NSW Act and CIPAA. It was for this reason that the Singapore High Court in *Tionq Sena Contractors (Pte) Ltd* at (see IA(P) 4- Tab 27) distinguished *Jemzone Ptv Ltd* (see IA(P) 4 — Tab 31) which was

decided on the Old NSW Act:

> 44. I am of the view that Austin J's holding in *Jemzone* ([20] supra) loses its significance once we appreciate that s 8 of the NSW Act (as it then was) did not define or explain the term 'progress payment'... In contrast to the NSW Act (as it then was), s 2 of our current version of the Act unambiguously defines 'progress payments' as 'a payment to which a person is entitled for the carrying out of cnstruction work, or the supply of goods or services, under a contract' — a definition which leans towards the adjudicatory ambit of the Act.

(c) The Malaysian position under the CIPAA

> 45. In *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200 at 218, (see IA(P) 3 - Tab 22) the Federal Court considered the 'settled general rule' that 'when a statute is susceptible of two or more interpretations, normally that interpretation should be accepted as *reflecting the will of the legislation* which is presumed to operate most equitably, justly and reasonably as judged by the ordinary and normal conceptions of what is right and what is wrong and of what is just and what is un just.
>
> 46. Accordingly, we humbly submit that the interpretation of the CIPAA to be exclusive to progress payments only would best reflect the will of the legislation.

[78] In my view, the CIPAA 2012 if by decisions of courts is made applicable to final account or final payment in relation to construction disputes as opposed to construction contract for interim payment, it may lead to abuse of process. My reasons are as follows:

(a) the CIPAA 2012 was meant to assist contractor to receive the interim payment for work in progress timely, as the law was that the contractor was obliged to complete the contract within time frame even if the employer did not pay timely the contractual payments for work done;

(b) the CIPAA 2012 mechanism for adjudication dispenses with trial process as well as law of evidence, etc. There is little that the respondent to a CIPAA 2012 adjudicator's decision can do to refuse payment. To summarily determine a final payment will be breach of rule of law and constitutional provisions and safeguards;

(c) to allow the contractor to enforce a final payment of summary adjudication process will be abhorrent to notion of justice and fair play and will cause irreparable loss to the employer in the event by arbitration process or litigation process it is found the employer is not liable to payment and the money is not commercially recoverable from the contractor;

(d) it is wrong to construe the Act of Parliament to include claims for final payment when the mischief the CIPAA 2012 was intended to cure was the timely payment for work related to progress payments and not final account;

(e) the CIPAA 2012 must not be interpreted by the courts to oppress the employers as that was not the aim, purpose and intent of the Act;

(f) it is principally wrong to read into the Act the phrase 'final payment' when Parliament has not expressly stated and the holistic reading of the Act will lean towards interim payments only as explained earlier; and

(g) the CIPAA 2012 which will be applicable also to the Federal or State Government contracts inclusive of its organs such as Federal and State owned or related corporations, etc in the capacity of employers of contract can be adversely affected if it relates to final payment and the money paid to the contractor subsequently is not recovered from the contractor upon an arbitration award or judgment in favour of the employer. It will then impinge on public purse, which requires the court to be vigilant when leaning to an interpretation which is not patently stated in the Act.

[79] It is one related to common sense to conceive generally that contractors and sub contractors will be persons who may not have financial strength or capacity in contrast to the employers. To say the CIPAA 2012 advocates full payment to be released on final account that too summarily will not subscribe to commercial reality as well as rule of law and constitutional safeguards enjoyed by others in litigation or arbitration process.

[80] The CIPAA 2012 mechanism has no form of civilised rules or law of evidence for the adjudicator to be bound and/or to allow the court to supervise the adjudication process at all and submitting to the adjudicator is also not a voluntary process. The adjudicator under the the CIPAA 2012 has been made a supreme decision maker, where his decision is right or wrong must be complied with. There is also no disciplinary mechanism to check the misconduct of adjudicator. History on rule of law has shown power corrupts and absolute power may lead to corruption, that too when it is related to a final payment. If the CIPAA 2012 is ruled to cover final payment, KLRCA will benefit from collection of administrative fees. That should not be seen as criteria to advocate the CIPAA 2012 for final payment when the Act does not say so. In addition, as a general rule, the courts will jealously guard its jurisdiction (see *The Abidin Daver* [1984] 1 All ER 470 and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anorther Case* [2017] 3 MLJ 561; [2017] 5 CLJ 526). It will be wrong in jurisprudence for KLRCA to seize jurisdiction for final payment under the CIPAA 2012 when the Act does not expressly say so. What has been expressly stated is only interim payments and not final payment. Simply put if the CIPAA 2012 is made applicable to final claim, it will lead to travesty of justice in the employers perspective as articulated by the appellant in this case.

[81] I have read the appeal records and the able submissions of the learned counsel. After giving much consideration to the submission of the learned counsel for the respondent, I take the view that both the appeals should be allowed. My reasons, inter alia, are as follows:

(a) the claim by the respondent is not related to the CIPAA 2012 and adjudicator will not have the jurisdiction to hear the dispute. In consequence, the decision of the adjudicator dated 14 April 2016 must be set aside; and

(b) upon the decision of the adjudicator being set aside, it will follow that the enforcement of the decision has to be set aside.

[82] For reasons stated above, both the appeals are allowed with costs. Both the decisions of the High Court related to ss 15 and 28 are set aside. The respondents shall pay the appellant a global sum of RM25,000 as costs for both appeals subject to allocatur. Deposit is to be refunded, with a note that the majority have dismissed the appeal with costs.

Order accordingly.

Reported by Afiq Mohamad Noor